In the Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-1517

RALPH HATHORN, ET AL.,
Petitioners,

vs.

MRS. BOBBY LOVORN, ET AL.,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF MISSISSIPPI

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Petitioners pray that a writ of certiorari issue to review the decision of the Supreme Court of Mississippi rendered on January 10, 1979.

OPINION BELOW

The decision of the Supreme Court of Mississippi is reported at 365 So.2d 947 and is appended hereto as Appendix "A".

JURISDICTION

The decision of the Supreme Court of Mississippi was entered on January 10, 1979. This petition for a writ of certiorari is being filed within ninety days of that date. This Court's jurisdiction is invoked pursuant to 28 U.S.C. §1257(3).

QUESTIONS PRESENTED

1. Whether the change from appointment by the Board of Aldermen to election by the qualified electors of three members of a five-member Board of Trustees of a local school district in Mississippi is covered by Section 5 of the Voting Rights Act of 1965, as amended.

2. Whether the change from election at-large to election by supervisors' districts of two members of a five-member Board of Trustees of a local school district in Mississippi is covered by the Voting Rights Act of 1965, as amended.

3. Whether a decree of a State Chancery Court in Mississippi is within reach of Section 5 of the Voting Rights Act of 1965, as amended.

STATEMENT OF THE CASE

Prior to July 1, 1960, the City of Louisville, Mississippi, operated its Louisville Municipal Separate School District inside the City Limits of Louisville, and the Winston County School Board operated the County School System governing the territory outside the City of Louisville. On January 25, 1960, the Winston County Board of Education entered an order abolishing the Winston County School District requesting that its territory be added to and annexed to the Louisville Municipal Separate School District. The Board of Trustees of the Louisville Municipal Separate School District consented to the territory of the County School District being added and annexed to the Louisville Municipal Separate School District, which annexation was approved by the State Education Finance Commission on April 4, 1960, said Commission making a finding that such

abolition and annexation would promote the educational welfare of the entire county and the efficiency of operating schools therein. The City of Louisville reserved and retained the right, pursuant to applicable existing law, to appoint three members of the five-member Board of Trustees with two Trustees being elected at-large from the added territory, even though other alternate methods of the selection of Trustees were lawfully available.

Continuously from July 1, 1960, to date, the only school district operating public schools in Winston County has been denominated the Louisville Municipal Separate School District with the Board of Trustees of this School District appointed and elected in the manner aforesaid.

In 1964 the Mississippi Legislature enacted two statutes which affected the School District. One section, being §37-7-615, Mississippi Code of 1972, changed the method by which the taxable property within the added territory outside the municipal limits should be assessed. The other change, being §37-7-203, Mississippi Code of 1972, required all members of the Board of Trustees of the School District to be elected from Supervisors' Districts.

Immediately after the enactment of §37-7-615, Mississippi Code of 1972, a suit was instituted by the City of Louisville against the Board of Supervisors of Winston County, Mississippi, challenging the constitutionality of the change effected by §37-7-615.

The Chancery Court of Winston County, Mississippi, by decree dated September 16, 1964, declared that the said section was unconstitutional, since it was of a local and private nature and, therefore, violated the Constitution of the State of Mississippi. Although the municipality did not attack in court said §37-7-203 which concerns the change of the selection of the board members of

the District, the municipality was of the opinion that said section was unconstitutional for the reasons given by the Chancery Court and, therefore, did not implement the change effected by §37-7-203. Therefore, the members of the Board of Trustees of the Louisville Municipal Separate School District have continued to be selected in the same manner as they were selected in 1960.

In 1975 certain citizens residing outside the corporate limits of Louisville, Mississippi, filed an action in the Chancery Court of Winston County requesting a mandatory injunction to enforce the election of a five-member Board of Trustees for the Municipal Separate School District as provided by §37-7-203, Mississippi Code of 1972. The Chancellor entered a Decree dismissing the action determining that said §37-7-203 was unconstitutional, since it was of a local and private nature and, therefore, violative of the Constitution of Mississippi. The Chancellor further determined that the method of selecting members of the Board of Trustees was not in violation of the one-person one-vote principle.

The Plaintiffs appealed to the Supreme Court of Mississippi, and that Court reversed the Chancellor as to his declaration that §37-7-203 was unconstitutional. The Court did not address the question as to one-person one-vote.

Petitioners filed a Petition for Rehearing En Banc and raised the question as to the applicability of §5 of the Voting Rights Act of 1965, as amended. A copy of that portion of the Petition and brief in support thereof which addresses the §5 question is attached hereto as Appendix "B". Although the Supreme Court, in its opinion, did not specifically discuss the §5 question, the Court sub silentio rejected Petitioners' contention, since it remanded the case for entry of a decree by the Chancellor

without the need or necessity of §5 preclearance. The §5 question had not been previously raised, but, being akin to a jurisdictional question, could be raised at any stage of the litigation.

The Supreme Court remanded the case to the Chancellor directing him to enter a decree requiring the School Board members to be elected from Supervisors' Districts of Winston County, Mississippi. Therefore, in effect, the Chancery Court is now mandated to require the selection of members of the Board of Trustees of the Louisville Municipal Separate School District in a manner different from the manner of selection which existed as of November 1, 1964. Such is a violation of §5 of the Voting Rights Act of 1965, as amended, since the local school district has not obtained preclearance of such procedure from the Attorney General of the United States or the United States District Court for the District of Columbia.

REASONS FOR GRANTING THE WRIT

The writ of certiorari should be granted since the mandate of the Supreme Court of Mississippi requires the Chancery Court of Winston County, Mississippi to enter a decree requiring these Petitioners to violate §5 of the Voting Rights Act of 1965, as amended.

Petitioners submit that the change in the selection of members of the Board of Trustees of the Louisville Municipal Separate School District mandated by the Supreme Court of Mississippi is a "standard practice or procedure with respect to voting" within the meaning of §5 of the Voting Rights Act of 1965, as amended. This Court in *Dougherty County, Ga. Bd. of Ed.* v. *White,* ..... U.S. ....., 58 L.Ed.2d 269, surveyed prior cases of the Court wherein the question as to what type of changes in voting

procedures were covered by §5 and concluded that said section must be given a broad construction. This Court has repeatedly determined that the central concern of Congress in enacting §5 was to protect against changed practices which may affect Negro voters. This Court in *Dougherty* admonished that:

> "Thus, in determining if an enactment triggers §5 scrutiny, the question is not whether the provision is in fact innocuous and likely to be approved, but whether it has *potential* for discrimination."

Petitioners submit that the change required by the decision of the Supreme Court of Mississippi has the potential for discrimination. This Court has previously determined that a change from an elected official to an appointed official is covered by the Act, *Allen* v. *Board of Education*, 393 U.S. 545, but has not had the occasion to determine whether a change from an appointed official to an elected official is covered by the Act. We submit that such change is covered. The United States District Court for the District of Columbia has so decided. *Horry Cty.* v. *United States*, 449 F.Supp. 990, 995 (1978). It takes little imagination to envision a situation by which Negro officials appointed by a City Council could not be elected if they had to face a voter constituency which was predominately of the Caucasian race. This Court is aware that many of the gains made by blacks in government, be it federal, state or local, have been through the appointive route.

The Attorney General of the United States has taken the position that a change in the selection of a public official in a covered state from the appointive method to the elective method is covered by §5. The Attorney General in developing procedures for the administration of §5 has determined that "any action. . . changing the method of selecting an official" is covered by the Act.

28 CFR §51.4(6).* This interpretation should be given consideration. *Udall* v. *Tallman*, 380 U.S. 1.

Petitioners further submit that the change from the election at-large of the two members who reside outside the corporate limits of Louisville, Mississippi, to election by Supervisors' Districts also has a potential of racial discrimination. Again, it is not difficult to conceive of a situation by which the two members, if elected at-large, would be black; if elected by Supervisors' Districts, one may be black representing an overwhelmingly black district, whereas the other member may be Caucasian coming from a predominately white district. This Court has previously determined that any change from at-large elections to district elections or the converse is covered by the Act. *Allen* v. *Board of Elections*, 393 U.S. 544.

The fact that the Mississippi statute which the Supreme Court of Mississippi has mandated the Chancery Court to require implemented was enacted prior to November 1, 1964, is of no moment. As previously stated, this statutory scheme of selecting members of the Board of Trustees of the local school district was never "administered" by the School District. On November 1, 1964, the members of the local school district were being selected in the same manner as they were selected in 1960, i.e. three members were appointed by the City Council and two members were elected at-large by the voters residing outside the corporate limits. This Court has previously held in *Perkins* v. *Matthews*, 400 U.S. 379, that the mere date of enactment of a statute is not controlling, but that the controlling date is that date when a covered political body "seeks to administer" the statute. In the action

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*The above-stated position of the Attorney General of the United States was confirmed by telephonic communication with the Chief of the Voting Section of the Attorney General of the United States.

sub judice the statute in question has never been administered and will not be administered until mandated by a decree of the Chancery Court of Winston County, Mississippi. Therefore, the local School District will be required "to administer" a voting procedure different from that existing on November 1, 1964.

This Court has previously declared that a decree of a United States District Court is not within the reach of §5 of the Voting Rights Act of 1965, as amended, *Connor* v. *Johnson*, 402 U.S. 690, 691; *East Carroll Parish School Board* v. *Marshall*, 424 U.S. 636, fn. 6, but has never addressed the question as to whether the decree of a covered state court is within the reach of §5. Petitioners suggest that a covered state court decree is within the reach of §5. Since Congress has determined that §5 questions should be adjudicated by a Three-Judge United States District Court, it would seem unlikely that a decree of a covered state court would not be subject to federal scrutiny, i.e. the Attorney General of the United States or United States District Court for the District of Columbia. The rationale for this Court's determination that the decree of a United States District Court is not subject to §5 scrutiny is based upon the principle of co-equal branches of the federal government. Such a determination is not necessary when the court is dealing with branches of two separate governments, one being paramount to the other. Again, it is the position of the United States that a decree of a covered state court is within the reach of §5. The Attorney General has taken the position that decrees of covered state courts approving municipal annexations are within the reach of §5.

Petitioners submit that this question, in and of itself, is of sufficient importance for this Court to grant the requested writ of certiorari. Immediately after the release

of the 1980 Census figures numerous local governments throughout the covered states will be required to redistrict in order to comply with the one-person one-vote principle. Many of the changes brought about by the 1980 Census will be commenced by litigation. These states need to have a definitive answer from this Court as to whether decrees of their respective state courts requiring redistricting are within the reach of §5. Further, it is not inconceivable that state court actions may be instituted in the covered states as to reapportionment of the State Legislatures and redistricting of the Congressional delegations. These states need guidance from this Court as to whether such actions, once finalized, must still receive clearance as provided for by §5.

CONCLUSION

Petitioners suggest that the Writ should issue since the Supreme Court of Mississippi decided a federal question in a way which conflicts with applicable decisions of this Court and interpretations of the Attorney General of the United States.

Further, the Mississippi Supreme Court has decided an important question of federal law which has not been, but should be, settled by this Court, i.e. whether a decree of a state court in a covered state is within the reach of §5 of the Voting Rights Act of 1965, as amended.

We submit to the Court that unless this Court issues the prayed for writ of certiorari and settles the important questions involved, the Petitioners will be placed in an untenable position of either the disobeyance of a state court injunction or the violation of a federal statute. It is here noted that the Supreme Court of Mississippi in its opinion not only reversed the Chancery Court, but

rendered judgment at the appellate level. This would appear to foreclose any consideration on remand by the Chancery Court of the applicability of §5 of the Voting Rights Act of 1965, as amended. It would appear that the Chancery Court is limited to the entrance of a decree requiring the Petitioners "to administer" a voting practice or procedure different from that which existed as of November 1, 1964, without preclearance from the Attorney General of the United States or the United States District Court for the District of Columbia.

For the aforementioned reasons, Petitioners are of the opinion that the writ of certiorari should be granted and that the questions here involved should be decided by this Court as guidance for actions to be taken by governmental units in the covered states.

Respectfully submitted,

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APPENDIX

APPENDIX "A"

Mrs. Bobby LOVORN, Sammy Carter, Joe Goodin, J. D. Eaves and Prentiss Carter

v.

Ralph HATHORN, Mayor of Louisville, et al.

No. 49446.

Supreme Court of Mississippi.

Oct. 4, 1978.

As Corrected On Denial of Rehearing Jan. 10, 1979.

Action was brought against mayor and others seeking mandatory injunction to enforce election of five-member school board for municipal separate school district. The Chancery Court, Winston County, John C. Love, Jr., Chancellor, dismissed bill of complaint, and complainants appealed. The Supreme Court, Lee, J., held that provision of statute governing election of board of trustees in school district embracing entire county which read "in which Highways 14 and 15 intersect" was unconstitutional, although remaining portion of statute was constitutional as being rational and germane to subject matter.

Reversed, rendered and remanded.

Statutes (Key) 64(2), 96(4)

Portion of statute providing for election of board of trustees for school district embracing entire county which read "in which highways 14 and 15 intersect" was unconstitutional as violation of prohibition on local, private or special laws; however, with offending language stricken, remaining portion of statute was constitutional as being rational and germane to subject matter. Code 1972, § 37-7-203; Const.1890, § 90(p).

Laurel G. Weir, Philadelphia, for appellants.

Fair & Mayo, James Mayo, Louisville, William A. Allain, Jackson, Frank Deramus, Louisville, for appellees.

Sara E. Gallaspy, Jackson, amicus curiae brief for Mississippi Municipal Association.

En Banc.

LEE, Justice, for the Court:

Mrs. Bobby Lovorn, et al., filed their bill of complaint against Ralph Hathorn, Mayor of Louisville, et al., in the Chancery Court of Winston County, seeking a mandatory injunction to enforce the election of a five-member school board for the Louisville Municipal Separate School District. The chancellor entered a decree dismissing the bill and complainants below appeal and assign the following errors in the trial:

(1) The chancellor erred in holding Mississippi Code Annotated Section 37-7-203 (1972) to be unconstitutional.

(2) The chancellor erred in holding that the constitutional rights of appellant were not being violated under the one-man one-vote principle.

(3) The chancellor erred in amending his decree after an appeal had been perfected to the Mississippi Supreme Court.

Since July 1, 1960, Louisville Municipal Separate School District has covered all of Winston County and has been the only school district in said county. Twenty-six hundred seventy-five (2,675) pupils outside the Louisville city limits and fourteen hundred eighteen (1,418) pupils inside the city limits attend the schools of said district. The population of Winston County is approximately eighteen thousand four hundred six (18,406) of which number approximately seven thousand (7,000) live within the City of Louisville. Taxes in the school district are assessed and collected by the Louisville City Tax Assessor and Collector, and the school district has issued negotiable bonds for the purpose of funding construction and maintenance of the schools. School taxes collected inside the city amount to two hundred ninety-four thousand nine hundred sixty-four dollars three cents ($294,964.03) and said taxes collected outside the city amount to two hundred fifty-five thousand eight hundred twelve dollars twenty-four cents ($255,812.24). There are fifty-two (52) municipal separate school districts in Mississippi and at least forty-eight (48) such districts have territory located outside the municipality which is embraced within the school district.

Since 1960, the Board of Trustees of Louisville Municipal Separate School District has been composed of five (5) members, three (3) of which are appointed by the governing authorities of the City of Louisville, and two (2) of which are elected by the qualified electors of the school district outside the city. That part of Mississippi Code Annotated Section 37-7-203 (1972) as amended, which

applies to this suit provides: ". . . in any county in which a municipal separate school district embraces the entire county *in which Highways 14 and 15 intersect*, one (1) trustee shall be elected from each supervisors district." (Emphasis added).

It is not disputed that the underscored phrase applies only to Winston County. Appellants' suit was brought to enforce election of one (1) trustee from each supervisor's district. They also contend that the method of selecting trustees for said municipal separate school district violates the one-man one-vote rule and that the right of individuals residing outside the Louisville city limits to vote for trustees was being unconstitutionally diluted in violation of the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution. The chancellor found the quoted part of the statute to be in violation of Section 90, Mississippi Constitution 1890, and unconstitutional. He also held that the one-man one-vote rule was inapplicable to the present case.

I.

Did the chancellor err in holding Mississippi Code Annotated Section 37-7-203 (1972), as amended, to be unconstitutional?

The basis of the chancellor's ruling is that the part of said statute referring to Highways 14 and 15 bears no rational relationship to the means of electing trustees in the school district, that it could not apply to any county except Winston County and that it is a local and private law in violation of Section 90(p), Mississippi Constitution 1890, which follows:

> "Section 90. The legislature shall not pass local, private or special laws in any of the following enumerated cases, but such matters shall be provided for only by general law, viz:
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> * * *
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> (p) Providing for the management or support of any private or common school, incorporating the same or granting such school any privileges; . . ."

We held in *Wilson* v. *Jones County Board of Supervisors*, 342 So.2d 1293 (Miss.1977), where the statute under consideration involved levying an additional two-mill tax in a county having a population in excess of fifty-nine thousand five hundred forty (59,540) and being traversed by U. S. Highway 11 which intersected U. S. Highway 84 (Jones County), that the classification must bear a rational relationship to the purpose of the section. We said:

> "It is the Court's duty in passing on the constitutionality of a statute to separate the valid from the invalid part, if this can be done, and to permit the valid part to stand unless the different parts of the statute are so intimately connected with and dependent upon each other as to warrant a belief that the legislature intended them as a whole, and that if all cannot be carried into effect it would not have enacted the residue independently. [Citing cases].
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> . . . We are therefore led to the inescapable conclusion that the legislature would have enacted the valid part of the statute independently of the invalid part because this is precisely what it did. The invalid part of the statute may be separated from the valid part and stricken out leaving a complete and consistent plan whereby counties may levy additional

taxes for general county purposes. We therefore hold that the part of section 27-39-304 authorizing counties to levy additional taxes for general county purposes, and the part in the last paragraph prescribing the procedure to be followed in making the levy, are constitutional." 342 So.2d at 1296, 1297.

An act providing that a county having two judicial districts and being intersected by U. S. Highway 84 and Interstate 59 was held to be unconstitutional in *Smith* v. *Transcontinental Gas Pipeline Corporation,* 310 So.2d 281 (Miss.1975). It was emphasized that the classification must be germane to the subject matter of the legislation.

In *Vardaman* v. *McBee,* 198 Miss. 251, 21 So.2d 661 (1945), the Court stated:

> "Class legislation, also often called local or private legislation, is legislation limited in operation to certain persons or classes of persons, natural or artificial, or to certain districts of the territory of the State, and statutes which make unreasonable or arbitrary classifications or discriminations violate provisions of Constitutions prohibiting special laws granting any special or exclusive privileges, immunities, or franchises, or passed for the benefit of individuals inconsistent with the general law of the land. 12 C.J., Sec. 855, p. 1128; 16A C.J.S. Constitutional Law § 489.
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> It is said in Ruling Case Law, 'Where a law is broad enough to reach every portion of the state and to embrace within its provision every person or thing distinguished by characteristics sufficiently marked and important to make them clearly a class by themseves, it is not a special or local, but a general, law, even though there may be but one member of the class or one place on which it operates." 198 Miss. at 260, 21 So.2d at 664.

The statute under consideration in *Board of Education* v. *Educational Finance Commission,* 243 Miss. 782, 138 So.2d 912 (1962), provided:

> " 'In cases involving two (2) counties, each of which is organized on the county-unit basis, where the students residing in one county have been attending and wish to continue attending the school situated in the adjoining county which children from their community have been attending for more than forty (40) years and where the county line lies within one thousand (1,000) yards of the school property, transfers may be granted for a period of time not to exceed five (5) years, subject to the approval of the two (2) respective county boards of education. In case the two (2) boards are unable to agree or in case there is a popular objection to the decision of the respective boards in the matter, appeals shall lie to the state educational finance commission whose decision shall be final.' " 243 Miss. at 804, 138 So.2d at 921.

In holding that the statute was not unconstitutional, the Court said:

> "The appellant Benton County Board of Education has invited the attention of this Court to the Mississippi Legislative House Journal of 1960 at page 388 in order to prove that the amendment here complained of was introduced by three representatives from Marshall County, Mr. Ash, Mrs. Slayden and Mr. Owen. It is further stated that the Court should take judicial knowledge of the enactment and says: 'There can be no question, but that this proviso was inserted for the sole and express purpose of taking care of the Potts Camp situation.' This may well

be true, but this Court has no right to assume such facts. The burden is upon one who attacks the constitutionality of a statute to show wherein it conflicts with the Constitution. We find the foregoing rule expressed in 11 Am.Jur. Constitutional Law, Sec. 132, p. 796, as follows: 'With regard to the duties cast upon the assailant of a legislative enactment, the rule is fixed that a party who alleges the unconstitutionality of a statute normally has the burden of substantiating his claim and must overcome the strong presumption in favor of its validity. It has been said that the party who wishes to pronounce a law unconstitutional takes on himself the burden of proving this conclusion beyond all doubt, and that a party who asserts that the legislature has usurped power or has violated the Constitution must affirmatively and clearly establish his position.'

In the case of *State ex rel. Jordan, District Attorney* v. *Gilmer Grocery Co.*, 156 Miss. 99, 125 So. 710, at p. 714, this Court said: 'Our own Court is committed to the proposition that a statute should be so construed as to render its constitutional, if possible, and a statute will not be declared invalid unless it is clearly apparent that it conflicts with the organic law after resolving all doubts in favor of its validity.'

It was also pointed out in *State ex rel. Knox, Attorney General* v. *Speakes et al.*, 144 Miss. 125, 109 So. 129, that where the meaning of a provision in a statute is not ascertainable from the act itself, it cannot be enforced by the courts, and certainly courts cannot go outside of the amendment of 1960 in this case, and the record, to find some meaning by which the amendment may be declared unconstitutional.

> We are reminded by the language set out in 16 C.J.S. Constitutional Law § 151(1), p. 738, that: 'The power of the judiciary in determining the constitutionality of a statute is limited to deciding whether it is within the scope of the constitutional powers of the legislative department. The judiciary will interfere with acts of the legislative body only where they are beyond the bounds prescribed by the constitution, and a legislative usurpation of power should be clear, palpable, or oppressive, and the claimed infringement of the constitution must be real to justify interposition. Limitations on the power of the legislature which the people have been satisfied to leave to the judgment, patriotism, and sense of justice of the legislature are not within the control of the courts. It is for the legislature and not for the courts to determine what means shall be employed to accomplish ends within its constitutional powers, * * *'." 243 Miss. at 812-814, 138 So.2d at 925-926.

Absent the provision referring to Highways 14 and 15 intersecting, the statute, which is a general statute, appears to be constitutional. Even though Louisville Municipal Separate School District encompasses all territory of the county, there are statutory procedures whereby any other county in the state could become similarly situated. Without the offensive part of Section 37-7-203, the statute appears to be rational and germane to the subject matter.

We hold that the part of said statute under consideration here which reads "in which Highways 14 and 15 intersect" is unconstitutional, that such offensive language be stricken from the act and that the remaining portion of the statute is constitutional. We further hold that the chancellor erred in finding the entire portion of the statute

to be unconstitutional and the decree is reversed and judgment entered here on said question.

II.

Did the chancellor err in holding that the constitutional rights of appellants were not being violated under the one-man one-vote principle?

III.

Did the chancellor err in amending his decree after an appeal had been perfected to the Mississippi Supreme Court?

Appellants contend that their right to vote for trustees is being unconstitutionally diluted in violation of the Equal Protection Clause of the Fourteenth Amendment and that the one-man one-vote rule is applicable to the election of trustees for said school district. They cite *Avery* v. *Midland County*, 390 U.S. 474, 88 S.Ct. 1114, 20 L.Ed.2d 45 (1968), and *Hadley* v. *Junior College District of Metropolitan Kansas City, Missouri*, 397 U.S. 50, 90 S.Ct. 791, 25 L.Ed.2d 45 (1970). In *Hadley*, the Supreme Court stated:

> "Appellants argue that since the trustees can levy and collect taxes, issue bonds with certain restrictions, hire and fire teachers, make contracts, collect fees, supervise and discipline students, pass on petitions to annex school districts, acquire property by condemnation, and in general manage the operations of the junior college, their powers are equivalent, for apportionment purposes, to those exercised by the county commissioners in *Avery*. We feel that these powers, while not fully as broad as those of the Midland County Commissioners, certainly show that the trustees perform important governmental functions within the districts, and we think these powers are general enough and have sufficient impact throughout the district to justify the conclusion that the principle which we applied in *Avery* should also be applied here.
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> . . . Thus in the case now before us, while the office of junior college trustee differs in certain respects from those offices considered in prior cases, it is exactly the same in the one crucial factor—these officials are elected by popular vote.
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> . . . If one person's vote is given less weight through unequal apportionment, his right to equal voting participation is impaired just as much when he votes for a school board member as when he votes for a state legislator. While there are differences in the power of different officials, the crucial consideration is the right of each qualified voter to participate on an equal footing in the election process. It should be remembered that in cases like this one we are asked by voters to insure that they are given equal treatment, and from their perspective the harm from unequal treatment is the same in any election, regardless of the officials selected.
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> It has also been urged that we distinguish for apportionment purposes between elections for 'legislative' officials and those for 'administrative' officers. Such a suggestion would leave courts with an equally unmanageable principle since governmental activities 'cannot easily be classified in the neat categories favored by civics texts,' *Avery*, supra, 390 U.S. at 482,

88 S.Ct. at 1119, 20 L.Ed.2d at 52, and it must also be rejected. We therefore hold today that as a general rule, whenever a state or local government decides to select persons by popular election to perform governmental functions, the Equal Protection Clause of the Fourteenth Amendment requires that each qualified voter must be given an equal opportunity to participate in that election, and when members of an elected body are chosen from separate districts, each district must be established on a basis that will insure, as far as is practicable, that equal numbers of voters can vote for proportionally equal numbers of officials." 397 U.S. at 53-56, 90 S.Ct. at 794-795, 25 L.Ed.2d at 49-51.

Appellees argue that the one-man one-vote rule does not apply and, among other decisions, cite *Sailors* v. *Board of Education of the County of Kent,* 387 U.S. 105, 87 S.Ct. 1549, 18 L.Ed.2d 650 (1967), wherein the court said that the rule did not apply since the county school board members were elected by delegates from local school boards and that the function of said school board was administrative rather than legislative or governmental. The Court further stated:

> "We find no constitutional reason why state or local officers of the nonlegislative character involved here may not be chosen by the governor, by the legislature, or by some other appointive means rather than by an election. Our cases have, in the main, dealt with elections for United States Senator or Congressman . . .
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> . . . If we assume arguendo that where a State provides for an election of a local official or agency—whether administrative, legislative, or judicial—the requirements of *Gray* v. *Sanders* [372 U.S. 368, 83 S.Ct. 801, 9 L.Ed.2d 821] and *Reynolds* v. *Sims* [377 U.S. 533, 84 S.Ct. 1362, 12 L.Ed.2d 506] must be met, no question of that character is presented. For while there was an election here for the local school board, no constitutional complaint is raised respecting that election. Since the choice of members of the county school board did not involve an election and since none was required for these nonlegislative offices, the principle of 'one man, one vote' has no relevancy." 387 U.S. at 108, 111, 87 S.Ct. at 1552, 1553, 18 L.Ed.2d at 653, 655.

The selection process here is neither fish nor fowl, three members of the board being appointed in the city and two members being elected outside the city. However, since the decision on Question I decides this case, we do not reach the problem presented by the one-man one-vote rule, and it is not necessary that we pass on the second and third questions here. Suffice it to say, we call attention of the Bench, Bar and Legislature to the question (which we do not decide) presented by the one-man one-vote rule which may affect fifty-two (52) municipal separate school districts in the State of Mississippi.

After consideration of this case by a conference of justices en banc, and for the reasons stated, the decree of the trial court is reversed, judgment is rendered here for appellants, and the case is remanded to the chancery court for further proceedings not inconsistent with this opinion.

REVERSED AND REMANDED FOR FURTHER PROCEEDINGS NOT INCONSISTENT WITH THIS OPINION.

PATTERSON, C. J. SMITH and ROBERTSON, P. JJ., and SUGG, WALKER, BROOM and COFER, JJ. concur.

BOWLING, J., took no part.

APPENDIX "B"

4.

The decision of this Honorable Court contains an error of law in that the action by the Court in reversing the lower Court and remanding the Cause to the Chancery Court for further proceedings not inconsistent with the Opinion of the Court contravenes, and is inconsistent with and does not comply with the *Voting Rights Act of 1965*, Section 5, 42 U.S.C.A., Section 1973 C, in that at all times since July of 1960, the Trustees of the Louisville Municipal Separate School District have been elected in a consistent manner without change and for this Court by the decision handed down or by judicial legislation or any further procedure by this Court or the lower Court to change the method and manner of the election of the Trustees which existed prior to November 1, 1964, without the approval of the Attorney General of the United States or the United States District Court for the District of Columbia, is as heretofore stated an error of law.

Since, at all times since 1960, the method and manner of the election and selection of the Board of Trustees of the Louisville Municipal Separate School District has been consistent, your Appellees-Petitioners herein would say that this Court or the lower Court is powerless to change or seek to administer a change in the method and manner of the election procedures of Winston County or the Louisville Municipal Separate School District without the approval of the Attorney General of the United States or the United States District Court for the District of Columbia because such action by this Court would be in conflict with the *Voting Rights Act of 1965*, Section 5, 42 U.S.C.A. Section 1973 C. The Supreme Court of the United

States in *Perkins* v. *Matthews*, 91 S. Ct. 431 (1971) held that any change in polling places or voting procedures by the City of Canton was within the meaning of Section 5 of the Voting Rights Act and requires compliance with same before implementing any change in election procedures. The Canton case in analogous to the Louisville Municipal Separate School case in that in 1962 the Legislature authorized a change to at-large elections but for some reason Canton ignored the mandate in the conduct of the 1965 municipal election and as in 1961, elected the Aldermen by wards. Canton contends in its argument that it had no choice but to comply with the 1962 Statute even though there was no attempt to change same until 1969 and after the Section 5 Voting Rights Act date of November 1, 1964. The reason for Canton's failure to conform its election law to state law does not appear in the record; however, on oral argument, Appellees' Counsel stated that the lapse was due to his overlooking the 1962 law and the Court held at page 440:

> "Consequently, we conclude that the procedure in fact "in force or effect" in Canton on November 1, 1964, was to elect Aldermen by wards. That sufficed to bring the 1969 change within Section 5. As was the case in *Allen*, it is clear, however, that the new procedure with respect to voting is different from the procedure in effect when . . . [Canton] became subject to the act; . . . 393 U.S., at 570, 89 S.Ct. at 834. The bearing of the 1962 statute upon the change was for the Attorney General or the District Court for the District of Columbia to decide."

This case is exactly identical to the Canton case because even though the House Bill 655 was enacted at the regular 1964 Legislative Session and prior to November 1, 1964, the change does not purport to go into effect

until after and thus Section 5 of the Voting Rights Act must be complied with and, therefore, this Court or the Court below is powerless to order or administer a change in election procedures without complying with the Act. Therefore, the decision handed down by this Honorable Court contains an error of law.

78-1517

In the Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-.....

RALPH HATHORN, ET AL.,
Petitioners,

vs.

MRS. BOBBY LOVORN, ET AL.,
Respondents.

OPPOSITION BRIEF TO PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF MISSISSIPPI

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OPPOSITION BRIEF TO PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF MISSISSIPPI

Respondents deny that a Writ of Certiorari should issue to review the decision of the Supreme Court of Mississippi rendered on January 10, 1979.

In support of their argument that no Writ of Certiorari should issue in this matter respondents show that the State of Mississippi is composed of 82 counties. Each county in the State of Mississippi has an elected Board of Education, one member from each of the 5 Supervisor Districts in said county, except no elected Board of Education exists in Winston County and Grenada County. The elections are required by the laws of the State of Mississippi enacted long before 1965. The state law is being flouted in Winston County, Mississippi, and not enforced, and instead the Board of Education is composed of 5 members, 3 of whom are appointed by the Board of Aldermen of the City of Louisville, Mississippi, and not elected, and the Board of Aldermen is elected only by voters in the City of Louisville, Mississippi, and upon which the

voters living outside the City limits but in Winston County cannot vote. Two members are alleged by petitioners to be elected by voters in the county, but there is no clear showing that it is a legal or fair election and instead is held in secrecy. In fact, it would do no good to elect 2 members when the other 3 constitute the majority and have full say so in requesting the taxes for the land in the entire county and directing the policies of the school including employing teachers, school officials, and setting the standards for the patrons of the entire County School System.

There are 2,675 pupils outside the City limits of Louisville and 1,418 pupils inside the City limits. The population of Winston County is approximately 18,406 of which number approximately 7,000 live within the City of Louisville.

Not only would the election of trustees as provided by the Mississippi Statute be equitable and fair, but also would give the right of individuals residing outside the Louisville City limits the right to vote for trustees now being unconstitutionally diluted in violation of the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution.

Suit was filed as a class action composed of Blacks, Reds, and Whites in the United States District Court for the Northern District of Mississippi to enforce the same rights granted by the Mississippi Supreme Court to respondents. The United States District Judge held the matter in abeyance while the matter was tried in the state courts and while the Mississippi Supreme Court had the matter for consideration. After the Mississippi Supreme Court ruled in favor of respondents said United States District Court dismissed the case pending there as being a moot question.

The petitioners argue that this Court has previously declared that a decree of a United States District Court is not within the reach of Section 5 of the Voting Rights Act of 1965 as amended but contend the decision of the Mississippi Supreme Court would be. However, the United States District Court for the Northern District of Mississippi had jurisdiction of the matter and held it until the decision of the Mississippi Supreme Court and then declared the matter moot from that point on and dismissed their action, giving their sanction to the decision of the Mississippi Supreme Court.

It is interesting to note that on page 7 the petitioners submit the change to election by Supervisors' Districts has a potential of discrimination. No Blacks have ever served on the Board of Education by appointment or election or on the Board of Supervisors. The Board of Aldermen could appoint a Black member but have not. The Blacks join in the request for an election just as a majority of all of the citizens of Winston County, Mississippi. Again, let it be said that the election law involved was enacted long before 1965 and has now been before the Mississippi Supreme Court for the first time where it has been declared Constitutional and legal. When the Mississippi Code of 1972 was enacted it brought forward the statute from the 1942 Mississippi Code and same has been approved by the Attorney General.

Even if there were no Mississippi Statute providing for an election for the Winston County Board of Education, the "one man, one vote" principle would still be denied the citizens. As stated in *Avery* v. *Midland County,* 390 U. S. 474 (1968) it is an established principle that the Constitutional doctrine of "one person, one vote" applies to the election of the local officials who exercise general governmental powers.

The extension of the applicability of the "one person, one vote" doctrine to local school board elections is mandated by *Hadley* v. *Junior College District,* 397 U. S. 50 (1970) in which case the Court held that the "one person, one vote" principle applied to the election of members of the board of a junior college district.

In *Hadley* a state statute established a consolidated junior college district by referendum vote and elect trustees to conduct and manage the necessary affairs of the district. The trustees levied and collected taxes, hired and fired teachers, made contracts, collected fees, supervised students, acquired property, and in general, managed the operations of the district. The Court examined this exercise of authority and concluded:

> ". . . as a general rule, whenever a state or local government decides to select persons by poplar election to perform governmental functions, the Equal Protection Clause of the Fourteenth Amendment requires that each qualified voter must be given an equal opportunity to participate in that election, and when members of an elected body are chosen from separate districts, each district must be established on a basis that will insure, as far as practicable, that equal number of voters can vote for proportionally equal number of officials." 397 U. S. at 56.

The Court left little doubt that traditionally organized school districts perform the requsite "governmental functions".

The Court reasoned:

> "Education has traditionally been a vital governmental function, and these trustees, whose election the state has opened to all qualified voters, are governmental officials in every relevant sense of that term." 397 U. S. at 56.

It is clear that if it is found that the "one man, one vote" principle is applicable to the instant case, the fact that the county voluntarily entered into the municipal separate school district would not justify the malapportionment. As stated in *Powers* v. *Maine School Administrative District No. 1,* 359 F. Supp. 30 (N.D. Me. 1973):

> "It is thus clear that the fact that Presque Isle voluntarily joined the defendant District cannot validate the District's malapportionment. The Supreme Court has consistently refused to permit a majority to debase the vote of a minority, and in this case the majority of the voters of Presque Isle who agreed to the dilution of their votes in the election of District directors cannot constitutionally deprive the minority of Presque Isle voters of their right to full representation on the District Board." 359 F. Supp. at 35.

The majority of the students who will be the future citizens of the State of Mississippi have no equal voice in the education of the children involved, such as the conditions and rules of the school attendance centers, selection of teachers, levying and collecting taxes and the position established by the school trustees.

One important case in point decided February 25, 1970, by the United States Supreme Court appearing in 397 U. S. at page 50, *Hadley* v. *Junior College District,* holds that whenever a State or local government by popular election selects persons to perform public functions the Equal Protection Clause of the Fourteenth Amendment requires that each qualified voter have an equal opportunity to participate in the election and when members of an elected body of persons from separate Districts each Dis-

trict must be established on a basis that as far as practicable will insure that equal numbers of voters can vote for proportionately equal numbers of officials, citing the case of *Avery* v. *Midland County*, 390 U. S. 474. The Decision of the United States Supreme Court, is as follows:

> "Appellants, residents and taxpayers of the Kansas City School District, one of eight school districts constituting the Junior College District of Metropolitan Kansas City, brought this suit claiming that their right to vote for trustees of the district was unconstitutionally diluted in violation of the Equal Protection Clause of the Fourteenth Amendment since their separate district contains approximately 60% of the total apportionment basis of the entire junior college district, but the state statutory formula results in the election of only 50% of the trustees from their district. The trial court's dismissal of the suit was upheld by the Missouri Supreme Court, which held the 'one man, one vote' principle inapplicable. Held: Whenever a state or local government by popular election selects persons to perform public functions the Equal Protection Clause of the Fourteenth Amendment requires that each qualified voter have an equal opportunity to participate in the election, and when members of an elected body are chosen from separate districts, each district must be established on a basis that as far as practicable will insure that equal numbers of voters can vote for proportionally equal numbers of officials." *Aevry* v. *Midland County*, 390 U.S. 474, pp. 52-59.
>
> 432 S. W. 2d 328, reversed and remanded."

"Mr. Justice Black delivered the opinion of the Court.

"This case involves the extent to which the Fourteenth Amendment and the 'one man, one vote' principle apply

in the election of local governmental officials. Appellants are residents and taxpayers of the Kansas City School District, one of eight separate school districts that have combined to form the Junior College District of Metropolitan Kansas City. Under Missouri law separate school districts may vote by referendum to establish a consolidated junior college district and elect six trustees to conduct and manage the necessary affairs of that district. The state law also provides that these trustees shall be apportioned among the separate school districts on the basis of 'school enumeration', defined as the number of persons between the ages of six and 20 years, who reside in each district. In the case of the Kansas City School District this apportionment plan results in the election of three trustees, or 50% of the total number from that district. Since that district contains approximately 60% of the total school enumeration in the junior college district, appellants brought suit claiming that their right to vote for trustees was being unconstitutionally diluted in violation of the Equal Protection Clause of the Fourteenth Amendment. The Missouri Supreme Court upheld the trial court's dismissal of the suit, stating that the 'one man, one vote' principle was not applicable in this case. 432 S. W. 2d 328 (1968). We noted probable jurisdiction of the appeal, 393 U. S. 1115 (1969); and for the reasons set forth below we reverse and hold that the Fourteenth Amendment requires that the trustees of this junior college district be apportioned in a manner that does not deprive any voter of his right to have his own vote given as much weight, as far as is practicable, as that of any other voter in the junior college district.

"In *Wesberry* v. *Sanders*, 376 U. S. 1 (1964), we held that the Constitution requires that 'as nearly as is prac-

ticable one man's vote in a congressional election is to be worth as much as another's' *Id.*, at 7-8. Because of this requirement we struck down a Georgia statute which allowed glaring discrepancies among the population in that State's congressional districts. In *Reynolds* v. *Sims,* 377 U. S. 533 (1964), and the companion cases, we considered state laws that had apportioned state legislatures in a way that again showed glaring discrepancies in the number of people who lived in different legislative districts. In an elaborate opinion in *Reynolds* we called attention to prior cases indicating that a qualified voter has a constitutional right to vote in elections without having his vote wrongfully denied, debased or diluted. *Ex parte Siebold,* 100 U. S. 371 (1880); *Ex parte Yarbrough,* 110 U. S. 651 (1884); *United States* v. *Mosley,* 238 U. S. 383 (1915); *Guinn* v. *United States,* 238 U. S. 347 (1915); *Lane* v. *Wilson,* 307 U. S. 268 (1939); *United States* v. *Classic,* 313 U. S. 299 (1941). Applying the basic principle of *Wesberry,* we therefore held that the various state apportionment schemes denied some voters the right guaranteed by the Fourteenth Amendment to have their votes given the same weight as that of other voters. Finally, in *Avery* v. *Midland County,* 390 U. S. 474 (1968), we applied the same principle to the election of Texas county commissioners, holding that a qualified voter in a local election also has a constitutional right to have his vote counted with substantially the same weight as that of any other voter in a case where the elected officials exercised 'general governmental powers over the entire geographic area served by the body.' *Id.*, at 485.

"Appellants in this case argue that the junior college trustees exercised general governmental powers over the entire district and that under *Avery* the State was

thus required to apportion the trustees according to population on an equal basis, as far as practicable. Appellants argue that since the trustees can levy and collect taxes, issue bonds with certain restrictions, hire and fire teachers, make contracts, collect fees, supervise and discipline students, pass on petitions to annex school districts, acquire property by condemnation, and in general manage the operations of the junior college, their powers are equivalent, for apportionment purposes, to those exercised by the county commissioners in *Avery.* We feel that these powers, while not fully as broad as those of the Midland County Commissioners, certainly show that the trustees perform important governmental functions within the districts, and we think these powers are general enough and have sufficient impact throughout the district to justify the conclusion that the principle which we applied in *Avery* should also be applied here.

"This Court has consistently held in a long series of cases, that in situations involving elections, the States are required to insure that each person's vote counts as much, insofar as it is practicable, as any other person's. We have applied this principle in congressional elections, state legislative elections, and local elections. The consistent theme of those decisions is that the right to vote in an election is protected by the United States Constitution against dilution or debasement. While the particular offices involved in these cases have varied, in each case a constant factor is the decision of the government to have citizens participate individually by ballot in the selection of certain people who carry out governmental functions. Thus in the case now before us, while the office of junior college trustee differs in certain respects from those offices considered in prior cases, it is exactly the same in one

crucial factor—these officials are elected by popular vote.

"When a court is asked to decide whether a State is required by the Constitution to give each qualified voter the same power in an election open to all, there is no discernible, valid reason why constitutional distinctions should be drawn on the basis of the purpose of the election. If one person's vote is given less weight through unequal apportionment, his right to equal voting participation is impaired just as much when he votes for a school board member as when he votes for a state legislator. While there are differences in the powers of different officials, the crucial consideration is the right of each qualified voter to participate on an equal footing in the election process. It should be remembered that in cases like this one we are asked by voters to insure that they are given equal treatment, and from their perspective the harm from unequal treatment is the same in any election, regardless of the officials selected.

"If the purpose of a particular election were to be the determining factor in deciding whether voters are entitled to equal voting power, courts would be faced with the difficult job of distinguishing between various elections. We cannot readily perceive judicially manageable standards to aid in such a task. It might be suggested that equal apportionment is required only in 'important' elections, but good judgment and common sense tell us that what might be a vital election to one voter might well be a routine one to another. In some instances the election of a local sheriff may be far more important than the election of a United States Senator. If there is any way of determining the importance of choosing a particular governmental official, we think

the decision of the State to select that official, by popular vote is a strong enough indication that the choice is an important one. This is so because in our country popular election has traditionally been the method followed when government by the people is most desired.

"It has also been urged that we distinguish for apportionment purposes between elections for 'legislative' officials and those for 'administrative' officers. Such a suggestion would leave courts with an equally unmanageable principle since governmental activities 'cannot easily be classified in the neat categories favored by civics tests', *Avery, supra,* at 482, and it must also be rejected. We therefore, hold today that as a general rule, whenever a state or local government decides to select persons by popular election to perform governmental functions, the Equal Protection Clause of the Fourteenth Amendment requires that each qualified voter must be given an equal opportunity to participate in that election, and when members of an elected body are chosen from separate districts, each district must be established on a basis that will insure, as far as practicable, that equal numbers of voters can vote for proportionally equal numbers of officials. It is of course possible that there might be some case in which a State elects certain functionaries whose duties are so far removed from normal governmental activities, and so disproportionately affect different groups that a popular election in compliance with *Reynolds, supra,* might not be required, but certainly we see nothing in the present case that indicates that the activities of these trustees fit in that category. Education has traditionally been a vital governmental function, and these trustees, whose election the State has opened to all qualified voters, are

governmental officials in every relevant sense of that term.

"In this particular case the 'one man, one vote' principle is to some extent already reflected in the Missouri statute. That act provides that if no one or more of the component school districts has 33 1/3% or more of the total enumeration of the junior college district, then all six trustees are elected at large. If however, one or more districts has between 33 1/3% and 50% of the total enumeration, each such district elects two trustees and the rest are elected at large from the remaining districts. Similarly, if one district has between 50% and 66 2/3% of the enumeration it elects three trustees, and if one district has more than 66 2/3% it elects four trustees. This scheme thus allocates increasingly more trustees to large districts as they represent an increasing proportion of the total enumeration.

"Although the statutory scheme reflects to some extent a principle of equal voting power, it does so in a way that does not comport with constitutional requirements. This is so because the Act necessarily results in a systematic discrimination against voters in the more populous school districts. This discrimination occurs because whenever a large district's percentage of the total enumeration falls within a certain percentage range, it is always allocated the number of trustees corresponding to the bottom of that range. Unless a particularly large district has exactly 33 1/3%, 50%, or 66 2/3% of the total enumeration it will always have proportionally fewer trustees than the small districts. As has been pointed out, in the case of the Kansas City School District approximately 60% of the total enumeration entitles that district to only

50% of the trustees. Thus while voters in large school districts may frequently have less effective voting power than residents of small districts, they can never have more. Such built-in discrimination against voters in large districts cannot be sustained as a sufficient compliance with the constitutional mandate that each person's vote count as much as another's as far as practicable. Consequently Missouri cannot allocate the junior college trustees according to the statutory formula employed in this case. We would be faced with a different question if the deviation from the equal apportionment presented in this case resulted from a plan that did not contain a built-in bias in favor of small districts, but rather from the inherent mathematical complications in equally apportioning a small number of trustees among a limited number of component districts. We have said before that mathematical exactitude is not required. *Wesberry, supra,* at 18, *Reynolds, supra,* at 577, but a plan that does not automatically discriminate in favor of certain districts is.

"In holding that the guarantee of equal voting strength for each voter applies in all elections of governmental officials, we do not feel that the States will be inhibited in finding ways to insure that legitimate political goals of representation are achieved. We have previously upheld against constitutional challenge an election scheme that required that candidates be residents of certain districts that did not contain equal numbers of people. *Dusch* v. *Davis,* 387 U. S. 112 (1967). Since all the officials in that case were elected at large, the right of each voter was given equal treatment. We have also held that where a State chooses to select members of an official body by appointment

rather than election, and that choice does not itself offend the Constitution, the fact that each official does not 'represent' the same number of people does not deny those people equal protection of the laws. *Sailors* v. *Board of Education,* 387 U. S. 105 (1967); cf. *Fortson* v. *Morris,* 385 U. S. 231 (1966). And a State may, in certain cases, limit the right to vote to a particular group or class of people. As we said before, '(v)iable local governments may need many innovations, numerous combinations of old and new devices, great flexibility in municipal arrangements to meet changing urban conditions. We see nothing in the Constitution to prevent experimentation.' *Sailors, supra,* at 110-111. But once a State has decided to use the process of popular election and 'once the class of voters is chosen and their qualifications specified, we see no constitutional way by which equality of voting power may be evaded.' *Gray* v. *Sanders,* 372 U. S. 368, 381 (1963).

"For the reasons set forth above the judgment below is reversed and the case is remanded to the Missouri Supreme Court for proceedings not inconsistent with this opinion.

Reversed and remanded."

As stated, the case of *Avery* v. *Midland County,* was decided April 1, 1968, and reported in 390 U. S. at page 474, and held that local units with general governmental powers over an entire geographical area may not, consistent with the Equal Protection Clause of the Fourteenth Amendment be apportioned among single-member districts of substantially unequal population, citing the case of *Reynolds* v. *Sims,* 377 U. S. 533.

"*AVERY* v. *MIDLAND COUNTY*, et al.

"Certiorari To The Supreme Court of Texas.

"No. 39 Argued November 14, 1967—

Decided April 1, 1968.

"The Midland County, Texas, Commissioners Court is the governing body for that county, and like other such bodies is established by the State's Constitution and statutes. It consists of five members—a County Judge, elected at large from the entire county, and four commissioners one elected from each of the four districts (precincts) into which the county is divided. Commissioners courts exercise broad governmental functions in the counties including the setting of tax rates, equalization of assessments, issuance of bonds, and allocation of funds; and they have wide discretion over expenditures. One district of Midland County, which includes almost all the City of Midland, had a population of 67,906, according to 1963 estimates. The others, all rural areas, had populations respectively, of about 852, 414, and 828. In this action challenging the County's districting petitioner alleged that the gross disparity in population distribution among the four districts violated the Equal Protection Clause of the Fourteenth Amendment. Three of the four commissioners testified at trial that population was not a major factor in the districting process. The trial court ruled for petitioner that each district under the State's constitutional apportionment standard should have 'substantially the same number of people.' An intermediate appellate court reversed. The State Supreme Court reversed that judgment, holding that under the Federal and State Constitutions the districting scheme was impermissible 'for the reasons stated by the trial court.' It held, however, that the work

actually done by the County Commissioners 'disproportionately concerns the rural areas' and that such factors as 'number of qualified voters, land areas, geography, miles of county roads, and taxable values' could justify apportionment otherwise than on a basis of substantially equal populations. *Held*: Local units with general governmental powers over an entire geographic area may not, consistently with the Equal Protection Clause of the Fourteenth Amendment, be apportioned among single-member districts of substantially unequal population. *Reynolds* v. *Sims*, 377 U. S. 533 (1964). Pp. 478-486.

"(a) The Equal Protection Clause reaches the exercise of state power, whether exercised by the State or a political subdivision. P. 479.

"(b) Although the state legislature may itself be properly apportioned the Fourteenth Amendment requires that citizens not be denied equal representation in political subdivisions which also have broad policy-making functions. P. 481.

"(c) The commissioners court performs some functions normally thought of as 'legislative', and others typically characterized in other terms; but, regardless of the labels, this body has the power to make a large number of decisions having a broad impact on all the citizens of the county. Pp. 482-483.

"(d) Though the Midland County Commissioners may concentrate their attention on rural roads, their decisions also affect citizens in the City of Midland. P. 484.

"406 S. W. 2d 422, vacated and remanded.

"Mr. Justice White delivered the opinion of the Court.

"Petitioner, a taxpayer and voter in Midland County, Texas, sought a determination by this Court that the Texas Supreme Court erred in concluding that selection of the Midland County Commissioners Court from single-member districts of substantially unequal population did not necessarily violate the Fourteenth Amendment. We granted review, 388 U. S. 905 (1967), because application of the one man, one vote principle of *Reynolds* v. *Sims*, 377 U. S. 533 (1964), to units of local government is of broad public importance. We hold that petitioner, as a resident of Midland County, has a right to a vote for the Commissioners Court of substantially equal weight to the vote of every other resident.

"Midland County has a population of about 70,000. The Commissioners Court is composed of five members. One, the County Judge, is elected at large from the entire county, and in practice casts a vote only to break a tie. The other four are Commissioners chosen from districts.

"The population of those districts, according to the 1963 estimates that were relied upon when this case was tried, was respectively 67,906; 852; 414; and 828. This vast imbalance resulted from placing in a single district virtually the entire city of Midland, Midland County's only urban center, in which 95% of the county's population resides.

"The Commissioners Court is assigned by the Texas Constitution and by various statutory enactments with a variety of functions. According to the commentary to Vernon's Texas Statutes, the court:

'is the general governing body of the county. It establishes a courthouse and jail, appoints numerous minor officials such as the county health officer, fills

vacancies in the county offices, lets contracts in the name of the county, builds roads and bridges, administers the county's public welfare services, performs numerous duties in regard to elections, sets the county tax rate, issues bonds, adopts the county budget, and serves as a board of equalization for tax assessments.'

"The court is also authorized, among other responsibilities to build and run a hospital. Tex. Rev. Civ. Stat. Ann., Art. 4492 (1966), an airport, *id.*, Art. 2351 (1964), and libraries, *id.*, Art. 1677 (1962). It fixes boundaries of school districts within the county, *id.*, Art. 2766 (1965), may establish a regional public housing authority, *id.*, Art. 1269k, Section 23a (1963), and determines the districts for election of its own members, Tex. Const., Art. V, Section 18.

"Petitioner sued the Commissioners Court and its members in the Midland County District Court, alleging that the disparity in district population violated the Fourteenth Amendment and that he had standing as a resident, taxpayer, and voter in the district with the largest population. Three of the four commissioners testified at the trial, all telling the court (as indeed the population statistics for the established districts demonstrated) that population was not a major factor in the districting process. The trial court ruled for petitioner. It made no explicit reference to the Fourteenth Amendment, but said the apportionment plan in effect was not 'for the convenience of the people,' the apportionment standard established by Art. V, Section 18, of the Texas Constitution. The court ordered the defendant commissioners to adopt a new plan in which each precinct would have 'substantially the same number of people.'

"The Texas Court of Civil Appeals reversed the judgment of the District Court and entered judgment for the respondents. 397 S. W. 2d 919 (1965). It held that neither federal nor state law created a requirement that Texas county commissioners courts be districted according to population.

"The Texas Supreme Court reversed the Court of Civil Appeals, 406 S. W. 2d 422 (1966). It held that under 'the requirements of the Texas and the United States Constitutions' the present districting scheme was impermissible 'for the reasons stated by the trial court.' 406 S. W. 2d, at 425. However, the Supreme Court disagreed with the trial court's conclusion that precincts must have substantially equal populations, stating that such factors as 'number of qualified voters, land areas, geography, miles of county roads and taxable values' could be considered. 406 S. W. 2d, at 428. It also decreed that no Texas Courts could redistrict the Commissioners Court. 'This is the responsibility of the commissioners court and is to be accomplished within the constitutional boundaries we have sought to delineate.' 406 S. W. 2d, at 428-429.

"In *Reynolds* v. *Sims*, *supra*, the Equal Protection Clause was applied to the apportionment of state legislatures. Every qualified resident, *Reynolds*, determined has the right to a ballot for election of state legislators of equal weight to the vote of every other resident, and that right is infringed when legislators are elected from districts of substantially unequal population. The question now before us is whether the Fourteenth Amendment likewise forbids the election of local government officials from districts of disparate population. As has almost every court which has addressed itself to this question, we hold that it does.

"The Equal Protection Clause reaches the exercise of state power however manifested, whether exercised directly or through subdivisions of the State.

'Thus the prohibitions of the Fourteenth Amendment extend to all action of the State denying equal protection of the laws; whatever the agency of the State taking the action. . . .' *Cooper* v. *Aaron,* 358 U. S. 1, 17 (1958).

"Although the forms and functions of local government and the relationships among the various units are matters of state concern, it is now beyond question that a State's political subdivisions must comply with the Fourteenth Amendment. The actions of local government are the actions of the State. A city, town, or county may no more deny the equal protection of the laws than it may abridge freedom of speech, establish an official religion, arrest without probable cause, or deny due process of law.

"When the State apportions its legislature, it must have due regard for the Equal Protection Clause. Similarly, when the State delegates lawmaking power to local government and provides for the election of local officials from districts specified by statute, ordinance, or local charter, it must insure that those qualified to vote have the right to an equally effective voice in the election process. If voters residing in oversize districts are denied their constitutional right to participate in the election of state legislators, precisely the same kind of deprivation occurs when the members of a city council, school board, or county governing board are elected from districts of substantially unequal population. If the five senators representing a city in the state legislature may not be elected from districts ranging in size from 50,000 to 500,000, neither

is it permissible to elect the members of the city council from those same districts. In either case, the votes of some residents have greater weight than those of others; in both cases the equal protection of the laws has been denied.

"That the state legislature may itself be properly apportioned does not exempt subdivisions from the Fourteenth Amendment. While state legislatures exercise extensive power over their constituents and over the various units of local government, the States universally leave much policy and decision making to their governmental subdivisions. Legislators enact many laws but do not attempt to reach those countless matters of local concern necessarily left wholly or partly to those who govern at the local level. What is more, in providing for the governments of their cities, counties, towns, and districts, the States characteristically provide for representative government—for decision making at the local level by representatives elected by the people. And, not infrequently, the delegation of power to local units is contained in constitutional provisions for local home rule which are immune from legislative interference. In a word, institutions of local government have always been a major aspect of our system, and their responsible and responsive operation is today of increasing importance to the quality of life of more and more of our citizens. We therefore see little difference, in terms of the application of the Equal Protection Clause and of the principles of *Reynolds* v. *Sims,* between the exercise of state power through legislatures and its exercise by elected officials in the cities, towns, and counties.

"We are urged to permit unequal districts for the Midland County Commissioners Court on the ground

that the court's functions are not sufficiently 'legislative.' The parties have devoted much effort to urging that alternative labels—'administrative' versus 'legislative'—be applied to the Commissioners Court. As the brief description of the court's functions above amply demonstrates, this unit of local government cannot easily be classified in the neat categories favored by civics texts. The Texas commissioners courts are assigned some tasks which would normally be thought of as 'legislative', others typically assigned to 'executive' or 'administrative' departments and still others which are 'judicial.' In this regard Midland County's Commissioners Court is representative of most of the general governing bodies of American cities, counties, towns, and villages. One knowledgeable commentator has written of 'the states' varied, pragmatic approach in establishing governments. R. Wood, in Politics and Government in the United States 891-892 (A. Westin ed. 1965). That approach has produced a staggering number of governmental units—the preliminary calculation by the Bureau of the Census for 1967 is that there are 81,304 'units of government' in the United States—and an even more staggering diversity. Nonetheless, while special-purpose organizations abound and in many States the allocation of functions among units results in instances of overlap and vacuum, virtually every American lives within what he and his neighbors regard as a unit of local government with general responsibility and power for local affairs. In many cases citizens reside within and are subject to two such governments, a city and a county.

"The Midland County Commissioners Court is such a unit. While the Texas Supreme Court found that the Commissioners Court's legislative functions are 'negligible,' 406 S. W. 2d, at 426, the court does have power

to make a large number of decisions having a broad range of impacts on all the citizens of the county. It sets a tax rate, equalizes assessments, and issues bonds. It then prepares and adopts a budget for allocating the county's funds, and is given by statute a wide range of discretion in choosing the subjects on which to spend. In adopting the budget the court makes both long-term judgments about the way Midland County should develop—whether industry should be solicited, roads improved, recreation facilities built, and land set aside for schools—and immediate choices among competing needs.

"The Texas Supreme Court concluded that the work actually done by the Commissioners Court 'disproportionately concern(s) the rural areas.' 406 S. W. 2d, at 428. Were the Commissioners Court a special-purpose unit of government assigned the performance of functions affecting definable groups of constituents more than other constituents, we would have to confront the question whether such a body may be apportioned in ways which give greater influence to the citizens most affected by the organizations functions. That question, however, is not presented by this case, for while Midland County authorities may concentrate their attention on rural roads, the relevant fact is that the powers of the Commissioners Court include the authority to make a substantial number of decisions that affect all citizens, whether they reside inside or outside the city limits of Midland. The Commissioners maintain buildings, administer welfare services, and determine school districts both inside and outside the city. The taxes imposed by the court fall equally in all property in the county. Indeed, it may not be mere coincidence that a body apportioned with three of its four voting members chosen by residents of the rural area sur-

rounding the city devotes most of its attention to the problems of that area, while paying for its expenditures with a tax imposed equally on city residents and those who live outside the city. And we might point out that a decision not to exercise a function within the court's power—a decision, for example, not to build an airport or a library, or not to participate in the federal food stamp program—is just as much a decision affecting all citizens of the county as an affirmative decision.

"The Equal Protection Clause does not, of course, require that the State never distinguish between citizens, but only that the distinctions that are made by arbitrary or invidious. The conclusion of *Reynolds* v. *Sims* was that bases other than population were not acceptable grounds for distinguishing among citizens when determining the size of districts used to elect members of state legislatures. We hold today only that the Constitution permits no substantial variation from equal population in drawing districts for units of local government having general governmental powers over the entire geographic area served by the body.

"This Court is aware of the immense pressures facing units of local government, and of the greatly varying problems with which they must deal. The Constitution does not require that a uniform straitjacket bind citizens in devising mechanisms of local government suitable for local needs and efficient in solving local problems, Last Term, for example, the Court upheld a procedure for choosing a school board that placed the selection with school boards of component districts even though the component boards had equal votes and served unequal populations. *Sailors* v. *Board of Education*, 387 U. S. 105 (1967). The Court rested on the

administrative nature of the area school board's functions and the essentially appointive form of the scheme employed. In *Dusch* v. *Davis*, 387 U. S. 112 (1967), the Court permitted Virginia Beach to choose its legislative body by a scheme that included at-large voting for candidates, some of whom had to be residents of particular districts, even though the residence districts varied widely in population.

"The *Sailors* and *Dusch* cases demonstrate that the Constitution and this Court are not roadblocks in the path of innovation, experiment, and development among units of local government. We will not bar what Professor Wood has called 'The emergence of new ideology and structure of public bodies, equipped with new capacities and motivations . . . .' R. Wood, 1400 Governments, at 175 (1961). Our decision today is only that the Constitution imposes one ground rule for the development of arrangements of local government; a requirement that units with general governmental powers over an entire geographic area not be apportioned among single-member districts of substantially unequal population.

"The judgment below is vacated and the case is remanded for disposition not inconsistent with this opinion.

"It is so ordered."

There is ample other authority on the "one man, one vote" theory and the Mississippi Supreme Court should be congratulated on following the law as announced by the Honorable United States Supreme Court and not requiring the United States District Court to have to enforce same.

The Order of the United States District Court for the Northern District of Mississippi upholding the "one man,

one vote" proposition, but leaving the matter as to Constitutionality of the Mississippi Statute on election dated July 1, 1975, is made "Appendix A-1" and the decision of said District Court dismissing the issues as moot was made pursuant to memorandum on behalf of defendants filed February 9, 1979, in view of the Mississippi Supreme Court decision is attached and marked exhibit "Appendix B-1".

CONCLUSION

More could be said for denying the Petition for Writ of Certiorari but it is clear that the decision of the Mississippi Supreme Court is correct and no further authority should be cited to show that the Petition for Writ of Certiorari should be denied and motion is made for it to be denied.

Respectfully submitted,

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Attorney for Respondents

CERTIFICATE

I certify a true copy of this opposing brief for respondents was mailed postage prepaid to the usual post office address of opposing counsel, Hon. James C. Mayo, Fair and Mayo, Hon. William A. Allain, and Hon. Frank Deramus at their usual post office addresses on this April 20, 1979.

LAUREL G. WEIR
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Philadelphia, Mississippi 39350
Attorney for Respondents

APPENDIX

APPENDIX A-1

IN THE
UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF MISSISSIPPI
EASTERN DIVISION

No. EC 74-161-S

SAMMY CARTER, et al
Plaintiffs

v.

MRS. CURTIS LUKE, et al
Defendants

ORDER

This cause is now before the court upon the question of this court's subject matter jurisdiction raised sua sponte by the court at a previous hearing in this case on April 24, 1975. The court has concluded that, while it perhaps has jurisdiction of this action pursuant to 28 U.S.C. § 1343(3), the proper procedure for the court to follow at this time is to stay any further proceedings in this cause pending an interpretation of Section 37-7-203, Mississippi Code Annotated (1972), by the courts of the State of Mississippi. City of Meridian v. Southern Bell Telephone and Telegraph Co., 3 L. Ed. 2d 562 (1959); Reetz v. Bozanich, 25 L. Ed. 2d 68 (1970). However, the court will retain jurisdiction of the cause pending the proceedings in the state courts. Trial Lawyers Association v. New Jersey Supreme Court, 34 L.

Ed. 2d 651 (1973); Lake Carriers' Association v. MacMullan, 32 L. Ed. 2d 257 (1972). Accordingly, it is

ORDERED:

(1) That all further proceedings in this cause are hereby stayed;

(2) That the plaintiffs are hereby granted sixty (60) days in which to institute an action in the courts of the State of Mississippi directed at a determination of the question of whether Section 34-7-203, Mississippi Code Annotated (1972) is compatible with the Constitutions of the United States and the State of Mississippi; and

(3) That failing the institution of the action referred to in paragraph two (2) above within the time there set forth, this cause shall be dismissed without prejudice.

This the 1st day of July, 1975.

/s/ (Illegible)
United States District Judge

APPENDIX B-1

IN THE
UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF MISSISSIPPI
EASTERN DIVISION

No. EC 74-161-S-P

SAMMY CARTER, et al,
Plaintiffs

vs.

MRS. CURTIS LUKE, et al,
Defendants

MEMORANDUM ON BEHALF OF DEFENDANTS

Comes now RALPH HATHORN, Mayor, et al Defendants by and through their counsel of record and in response to the direction from the United States Magistrate, the Defendants respond by asserting that the Supreme Court of the State of Mississippi has rendered its opinion and decision in Cause No. 49,446 and has denied a Petition for Rehearing, copies of which have previously been furnished to this Honorable Court and because the Plaintiff has been awarded the relief sought, the Defendants say that the issues in the above styled and captioned cause are now moot and the said cause should be dismissed without prejudice.

Respectfully submitted,

Ralph Hathorn, Mayor, et al
By: /s/ James C. Mayo
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CERTIFICATE OF SERVICE

I, JAMES C. MAYO, of FAIR & MAYO, ATTORNEYS do hereby certify that I have this day mailed by United States mail postage prepaid, a true and correct copy of the above and foregoing Memorandum on Behalf of Defendants to:

Honorable Laurel G. Weir
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Honorable Sara Gallaspy
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Attorney at Law
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Honorable Charles M. Powers
United States Magistrate
United States District Court
Post Office Drawer 726
Aberdeen, MS 39730

Dated this the 9th day of February, 1979.

/s/ James C. Mayo
James C. Mayo